

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

JASON SMITH,  
Plaintiff,  
v.  
M. DAGUIO, et al.,  
Defendants.

Case No. 18-06378 BLF (PR)

**ORDER OF PARTIAL DISMISSAL  
AND OF SERVICE; DIRECTING  
DEFENDANTS TO FILE  
DISPOSITIVE MOTION OR  
NOTICE REGARDING SUCH  
MOTION; INSTRUCTIONS TO  
CLERK**

Plaintiff, a state prisoner, filed the instant pro se civil rights action pursuant to 42 U.S.C. § 1983 against prison officers at the Correctional Training Facility (“CTF”) in Soledad. The Court dismissed the complaint with leave to amend to attempt to correct several deficiencies. (Docket No. 6.) Plaintiff has filed an amended complaint. (Docket No. 7.)

**DISCUSSION**

**A. Standard of Review**

A federal court must conduct a preliminary screening in any case in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity. *See* 28 U.S.C. § 1915A(a). In its review, the court must identify any

cognizable claims and dismiss any claims that are frivolous, malicious, fail to state a claim upon which relief may be granted or seek monetary relief from a defendant who is immune from such relief. *See id.* § 1915A(b)(1),(2). Pro se pleadings must, however, be liberally construed. *See Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1988).

To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential elements: (1) that a right secured by the Constitution or laws of the United States was violated, and (2) that the alleged violation was committed by a person acting under the color of state law. *See West v. Atkins*, 487 U.S. 42, 48 (1988).

**B. Plaintiff’s Claims**

Plaintiff claims that on January 23, 2018, he was denied access to the library by Defendant Correctional Officer M. Daguio. (Am. Compl. at 6-7, original pagination.) On January 25, 2018, Plaintiff asked Defendant Daguio for a temporary pass to access the law library, at which time he also informed Defendant Daguio that he intended to file an administrative grievance against him for denying him access to the law library on January 23, 2018. (*Id.* at 7.) Plaintiff claims that in response, Defendant Daguio stated that he was tired of hearing about all the grievances Plaintiff had submitted in the past and threatened to assign a cell-mate to Plaintiff or have him moved out of the unit. (*Id.* at 7-8.) Plaintiff claims that he went ahead and filed an inmate appeal that same day. (*Id.* at 8.) Plaintiff claims Defendant Daguio chilled his First Amendment rights, and that his actions did not reasonably advance a legitimate correctional goal. (*Id.*)

Later that same day, Defendant R. Avalos informed Plaintiff that he was being assigned a cell-mate, and that any objections would result in a Rules Violation Report (“RVR”) being issued per Defendant Daguio, which Defendant Avalos would fully support. (*Id.* at 7.) Plaintiff claims Defendant Avalos’s actions chilled his First Amendment rights and did not reasonably advance a legitimate correctional goal. (*Id.*)

After speaking with the inmate, Plaintiff informed Defendant Avalos that they were not compatible and that there was “a significant risk to the physical safety of Plaintiff and

1 possibility to staff” because of the cell-mate’s “interest in possessing dangerous  
2 contraband.” (*Id.* at 9.) The next day, on January 26, 2018, Plaintiff received an RVR for  
3 refusing to house with the inmate. (*Id.*) Plaintiff claims that several months later,  
4 Defendant Avalos was confronted with “the same/or similar situation” with another  
5 inmate, but that in that case Defendant Avalos allowed the inmate to find alternate  
6 housing. (*Id.* at 10.) Plaintiff claims that Defendant Avalos’s actions show  
7 “preferential/discriminatory treatment” where there was no rational basis for the dissimilar  
8 treatment, in violation of Equal Protection. (*Id.*)

9 On January 28, 2018, Plaintiff sent a request for clarification regarding “CDCR’s  
10 policies involving inmate housing assignments compatibility factor” to the supervising  
11 Sgt., Defendant C. Peaden, who had “signed off” on the RVR without making any personal  
12 inquiries. (*Id.* at 9-10.)

13 When Plaintiff appeared before Defendant B. Greer, the senior hearing officer, for  
14 the disciplinary hearing on the RVR on January 31, 2018, he was found guilty and  
15 assessed numerous losses of privileges, including 30 days loss of canteen, phone,  
16 recreation, package, property, and privilege group “C,” as well as 61 days loss of good  
17 time credit. (*Id.* at 10.) Plaintiff claims that his right to due process was violated at this  
18 hearing because he was denied his right to call a witness. (*Id.*) Plaintiff claims after he  
19 appealed, the RVR was twice reissued and reheard based on the violation of his procedural  
20 due process rights, but that at both subsequent rehearings, his procedural due process rights  
21 were again violated. (*Id.* at 12-14.)

22 Based on the above allegations, Plaintiff claims denial of his First Amendment right  
23 to petition the government for redress of grievances (Count 1), violation of due process  
24 based on the false RVR (Count 2), and retaliation (Count 3). (*Id.* at 15-17.) Plaintiff also  
25 claims that he was deprived of his right to Equal Protection. (*Id.* at 17.) Plaintiff seeks  
26 declaratory and injunctive relief as well as damages. (*Id.* at 18-20.)

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Prisoners have a constitutional right of access to the courts. *See Lewis v. Casey*, 518 U.S. 343, 350 (1996); *Bounds v. Smith*, 430 U.S. 817, 821 (1977). The right of meaningful access to the courts extends to established prison grievance procedures. *See Bradley v. Hall*, 64 F.3d 1276, 1279 (9th Cir. 1995); *accord Hines v. Gomez*, 853 F. Supp. 329, 331-32 (N.D. Cal. 1994). This right is subsumed under the First Amendment right to petition the government for redress of grievances, *see id.* at 333, and protects both the filing, *see id.*, and content, *see Bradley*, 64 F.3d at 1279, of prison grievances. To establish a claim for any violation of the right of access to the courts, the prisoner must prove that there was an inadequacy in the prison's legal access program (e.g., law library or legal assistance) that caused him an actual injury. *See Lewis*, 518 U.S. at 349-51. To prove an actual injury, the prisoner must show that the inadequacy in the prison's program hindered his efforts to pursue a non-frivolous claim concerning his conviction or conditions of confinement. *See id.* at 351, 354-55.

Plaintiff was advised in the Court’s order of dismissal that his allegations were insufficient to state a denial of access to the courts claim because he failed to allege actual injury. (Docket No. 6 at 3-4.) Plaintiff was advised that he must describe what non-frivolous claim concerning his conviction or conditions of confinement he was hindered from pursuing. *See Lewis*, 518 U.S. at 351, 354-55. Here, Plaintiff states plainly that even after he was “threatened” by Defendant Daguio on January 23, 2018, Plaintiff went ahead and filed the appeal anyway. *See supra* at 2. Accordingly, even if we assume Plaintiff was pursuing a non-frivolous claim, Plaintiff fails to allege actual injury, i.e., that he was hindered from pursuing his claim. Plaintiff’s allegation that Defendant Daguio’s actions “chilled” his First Amendment rights may be relevant for alleging a retaliation claim, but not for the denial of access to courts claim. Accordingly, this claim is DISMISSED for failure to state a claim for relief.

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1           **2. Retaliation**

2           “Within the prison context, a viable claim of First Amendment retaliation entails  
3 five basic elements: (1) An assertion that a state actor took some adverse action against an  
4 inmate (2) because of (3) that prisoner’s protected conduct, and that such action (4) chilled  
5 the inmate’s exercise of his First Amendment rights, and (5) the action did not reasonably  
6 advance a legitimate correctional goal.” *Rhodes v. Robinson*, 408 F.3d 559, 567-68 (9th  
7 Cir. 2005) (footnote omitted).

8           Plaintiff’s claim that Defendants Daguio and Avalos took adverse action against  
9 him, i.e., assigned him a cellmate and issued a false RVR, because Plaintiff engaged in  
10 protected conduct is cognizable as he has also alleged that their actions “chilled” his First  
11 Amendment rights and did not advance a legitimate correctional goal is cognizable. *Id.*

12           **3. Due Process**

13           Plaintiff’s allegation that he was denied his right to call witnesses during the  
14 disciplinary proceeding before Defendant Greer may be an attempt to state a violation of  
15 his procedural due process rights under *Wolff v. McDonnell*, 418 U.S. 539 (1974). Plaintiff  
16 alleges in the amended complaint that he suffered 30-days loss of several privileges, as  
17 well as 61 days loss of good time credits. *See supra* at 3. A challenge to a disciplinary  
18 finding that resulted in assessment of time credits must be brought in habeas if  
19 reinstatement of the time credits would “necessarily spell speedier release.” *See Skinner v.*  
20 *Switzer*, 561 U.S. 521, 525 (2011). Here, success on Plaintiff’s claim on the allegedly  
21 false RVR would result in the reinstatement of time credits that would “necessarily spell  
22 speedier release,” and therefore lies at the core of habeas corpus. *Id.*

23           Furthermore, in order to recover damages for an allegedly unconstitutional  
24 conviction or imprisonment, or for other harm caused by actions whose unlawfulness  
25 would render a conviction or sentence invalid, a 42 U.S.C. § 1983 plaintiff must prove that  
26 the conviction or sentence has been reversed on direct appeal, expunged by executive  
27 order, declared invalid by a state tribunal authorized to make such determination, or called

1 into question by a federal court's issuance of a writ of habeas corpus. *Heck v. Humphrey*,  
2 512 U.S. 477, 486-487 (1994). Where a claim seeking expungement of a disciplinary  
3 finding would, if successful, “necessarily accelerate” the prisoner’s release on parole, *Heck*  
4 applies. *Ramirez v. Galaza*, 334 F.3d 850, 858-59 (9th Cir. 2003) (interpreting *Neal v.*  
5 *Shimoda*, 131 F.3d 818 (9th Cir. 1997)).

6 Accordingly, this due process claim must be dismissed to filing it in a petition for  
7 habeas corpus under 28 U.S.C. § 2254 for the restoration of time credits. Only after he has  
8 succeeded in having the RVR reversed and good time credits restored may Plaintiff seek  
9 damages in a § 1983 action.

#### 10 **4. Equal Protection**

11 Plaintiff asserts that his rights under the Equal Protection Clause was violated  
12 because he was treated differently from a similarly situated prisoner when it came to a  
13 housing assignment based on compatibility issues. (Compl. at 5.)

14 When challenging his treatment with regard to other prisoners, courts have held that  
15 in order to present an equal protection claim a prisoner must allege that his treatment is  
16 invidiously dissimilar to that received by other inmates. *More v. Farrier*, 984 F.2d 269,  
17 271-72 (8th Cir. 1993) (absent evidence of invidious discrimination, federal courts should  
18 defer to judgment of prison officials); *Timm v. Gunter*, 917 F.2d 1093, 1099 (8th Cir.  
19 1990) (same). The first step in determining whether the inmate’s equal protection rights  
20 were violated is to identify the relevant class of prisoners to which he belongs. *Furnace v.*  
21 *Sullivan*, 705 F.3d 1021, 1030 (9th Cir. 2013). The class must be comprised of similarly  
22 situated persons so that the factor motivating the alleged discrimination can be identified.  
23 *Id.* at 1031 (affirming district court’s grant of defendants’ motion for summary judgment  
24 because inmate failed to raise triable issue of fact that he was treated differently than any  
25 other inmate whom the officers did not know was entitled to a vegetarian meal).

26 Plaintiff’s allegations are insufficient to state an equal protection claims because he  
27 fails to allege how he and the alleged inmate, who did not receive an RVR for refusing a  
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1 housing assignment, are similarly situated. Plaintiff only makes a single, conclusory  
2 allegation that he was a “similarly situated prisoner like inmate Sheppard when he had  
3 compatibility concerns.” (Am. Compl. at 10.) Plaintiff has already been afforded one  
4 opportunity to amend, and this Court has broad discretion to deny leave to amend where  
5 Plaintiff has already been granted leave to file an amended complaint. *See Wagh v. Metris*  
6 *Direct, Inc.*, 363 F.3d 821, 830 (9th Cir. 2003); *Ferdik v. Bonzelet*, 963 F.2d 1258, 1261  
7 (9th Cir. 1992). Accordingly, this claim is DISMISSED for failure to state a claim.

### 8 9 CONCLUSION

10 For the reasons state above, the Court orders as follows:

11 1. Plaintiff’s access to the courts and equal protection claims are DISMISSED  
12 with prejudice for failure to state a claim. Plaintiff’s due process claim is DISMISSED to  
13 filing as a separate habeas action. The Clerk shall enclose a court form petition and In  
14 Forma Pauperis Application with a copy of this order to Plaintiff.

15 2. The Clerk of the Court shall mail a Notice of Lawsuit and Request for  
16 Waiver of Service of Summons, two copies of the Waiver of Service of Summons, a copy  
17 of the amended complaint, (Docket No. 7), all attachments thereto, and a copy of this order  
18 upon **Defendants M. Daguio and R. Avalos at the Correctional Training Facility (P.O.**  
19 **Box 689, Soledad, CA 93960).** The Clerk shall also mail a copy of this Order to Plaintiff.

20 The Clerk shall terminate Defendants Lt. Brian Greer and Lt. C. Peaden from this  
21 action as all claims against them have been dismissed.

22 3. Defendants are cautioned that Rule 4 of the Federal Rules of Civil  
23 Procedure requires them to cooperate in saving unnecessary costs of service of the  
24 summons and the complaint. Pursuant to Rule 4, if Defendants, after being notified of this  
25 action and asked by the Court, on behalf of Plaintiff, to waive service of the summons, fail  
26 to do so, they will be required to bear the cost of such service unless good cause shown for  
27 their failure to sign and return the waiver form. If service is waived, this action will

1 proceed as if Defendants had been served on the date that the waiver is filed, except that  
2 pursuant to Rule 12(a)(1)(B), Defendants will not be required to serve and file an answer  
3 before **sixty (60) days** from the day on which the request for waiver was sent. (This  
4 allows a longer time to respond than would be required if formal service of summons is  
5 necessary.) Defendants are asked to read the statement set forth at the foot of the waiver  
6 form that more completely describes the duties of the parties with regard to waiver of  
7 service of the summons. If service is waived after the date provided in the Notice but  
8 before Defendants have been personally served, the Answer shall be due sixty (60) days  
9 from the date on which the request for waiver was sent or twenty (20) days from the date  
10 the waiver form is filed, whichever is later.

11 4. No later than **ninety-one (91) days** from the date this order is filed,  
12 Defendants shall file a motion for summary judgment or other dispositive motion with  
13 respect to the claims in the complaint found to be cognizable above.

14 a. Any motion for summary judgment shall be supported by adequate  
15 factual documentation and shall conform in all respects to Rule 56 of the Federal Rules of  
16 Civil Procedure. Defendants are advised that summary judgment cannot be granted, nor  
17 qualified immunity found, if material facts are in dispute. If any Defendant is of the  
18 opinion that this case cannot be resolved by summary judgment, he shall so inform the  
19 Court prior to the date the summary judgment motion is due.

20 b. **In the event Defendants file a motion for summary judgment, the**  
21 **Ninth Circuit has held that Plaintiff must be concurrently provided the appropriate**  
22 **warnings under *Rand v. Rowland*, 154 F.3d 952, 963 (9th Cir. 1998) (en banc). See**  
23 ***Woods v. Carey*, 684 F.3d 934, 940 (9th Cir. 2012).**

24 5. Plaintiff's opposition to the dispositive motion shall be filed with the Court  
25 and served on Defendants no later than **twenty-eight (28) days** from the date Defendants'  
26 motion is filed.

27 Plaintiff is also advised to read Rule 56 of the Federal Rules of Civil Procedure and  
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1 *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) (holding party opposing summary judgment  
2 must come forward with evidence showing triable issues of material fact on every essential  
3 element of his claim). Plaintiff is cautioned that failure to file an opposition to  
4 Defendants' motion for summary judgment may be deemed to be a consent by Plaintiff to  
5 the granting of the motion, and granting of judgment against Plaintiff without a trial. *See*  
6 *Ghazali v. Moran*, 46 F.3d 52, 53–54 (9th Cir. 1995) (per curiam); *Brydges v. Lewis*, 18  
7 F.3d 651, 653 (9th Cir. 1994).

8 6. Defendants *shall* file a reply brief no later than **fourteen (14) days** after  
9 Plaintiff's opposition is filed.

10 7. The motion shall be deemed submitted as of the date the reply brief is due.  
11 No hearing will be held on the motion unless the Court so orders at a later date.

12 8. All communications by the Plaintiff with the Court must be served on  
13 Defendants, or Defendants' counsel once counsel has been designated, by mailing a true  
14 copy of the document to Defendants or Defendants' counsel.

15 9. Discovery may be taken in accordance with the Federal Rules of Civil  
16 Procedure. No further court order under Federal Rule of Civil Procedure 30(a)(2) or Local  
17 Rule 16-1 is required before the parties may conduct discovery.

18 10. It is Plaintiff's responsibility to prosecute this case. Plaintiff must keep the  
19 court informed of any change of address and must comply with the court's orders in a  
20 timely fashion. Failure to do so may result in the dismissal of this action for failure to  
21 prosecute pursuant to Federal Rule of Civil Procedure 41(b).

22 11. Extensions of time must be filed no later than the deadline sought to be  
23 extended and must be accompanied by a showing of good cause.

24 **IT IS SO ORDERED.**

25 **Dated: \_September 24, 2019\_**



BETH LABSON FREEMAN  
United States District Judge